

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANE M.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C21-1581-MLP

ORDER

I. INTRODUCTION

Plaintiff seeks review of the denial of her application for Disability Insurance Benefits (“DIB”). Plaintiff contends the administrative law judge (“ALJ”) erred in: (1) finding at step two that Plaintiff’s irritable bowel syndrome (“IBS”) was not severe and in failing to address Plaintiff’s right foot pain, (2) finding at step three that she did not meet or equal Listing 1.04, and (3) discounting Plaintiff’s allegations based on mischaracterizations of the record. (Dkt. # 15 at 1-6.) As discussed below, the Court AFFIRMS the Commissioner’s final decision and DISMISSES the case with prejudice.

II. BACKGROUND

Plaintiff was born in 1965, has a college degree, and has worked for grocery stores as a bookkeeper, cashier, and deli assistant; as a pizza delivery driver; and as a garden center

1 greenhouse horticulture assistant. AR at 178, 272. Plaintiff was last gainfully employed in 2009.

2 *Id.* at 177.

3 In April 2019, Plaintiff applied for benefits, alleging disability as of September 1, 2003,
 4 with a date last insured (“DLI”) of June 30, 2011.¹ AR at 149-50. Plaintiff’s DIB application was
 5 denied initially and on reconsideration, and Plaintiff requested a hearing. *Id.* at 99-101, 108-11.
 6 Plaintiff waived her right to a hearing (*id.* at 112), and the ALJ issued a decision finding Plaintiff
 7 not disabled. *Id.* at 11-20.

8 As the Appeals Council denied Plaintiff’s request for review, the ALJ’s decision is the
 9 Commissioner’s final decision. AR at 1-5. Plaintiff appealed the final decision of the
 10 Commissioner to this Court. (Dkt. # 4.)

11 III. LEGAL STANDARDS

12 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social
 13 security benefits when the ALJ’s findings are based on legal error or not supported by substantial
 14 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a
 15 general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the
 16 ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
 17 (cited sources omitted). The Court looks to “the record as a whole to determine whether the error
 18 alters the outcome of the case.” *Id.*

19 “Substantial evidence” is more than a scintilla, less than a preponderance, and is such
 20 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
 21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
 22 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical

23 ¹ Plaintiff also protectively applied for Supplemental Security Income in April 2019, and this application
 was approved upon initial review. See AR at 11, 83-98, 139-48.

1 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
 2 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
 3 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*
 4 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one
 5 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

6 IV. DISCUSSION

7 A. The ALJ Did Not Err at Step Two

8 Plaintiff contends that the ALJ erred at step two in two ways: (1) in failing to
 9 acknowledge her right foot pain, and (2) in finding her IBS not severe. (Dkt. # 15 at 3-4.) The
 10 Court will address each condition in turn.

11 1. Legal Standards

12 At step two, a claimant must make a threshold showing that her medically determinable
 13 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
 14 *Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work
 15 activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R.
 16 §§ 404.1522(b), 416.922(b). “An impairment or combination of impairments can be found ‘not
 17 severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal
 18 effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)
 19 (quoting Social Security Ruling 85-28). “[T]he step two inquiry is a de minimis screening device
 20 to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required
 21 to consider the “combined effect” of an individual’s impairments in considering severity. *Id.* A
 22 diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show
 23 his medically determinable impairments are severe. 20 C.F.R. §§ 404.1521, 416.921.

1 2. *Right Foot Pain*

2 Plaintiff contends that the ALJ erred in failing to address her chronic foot pain. (Dkt. # 15
3 at 3.) She notes that the record references a surgery she had in 1990 for neuroma (*id.*), but does
4 not cite any evidence establishing the existence of a right foot condition during the adjudicated
5 period (September 1, 2003, through June 30, 2011) or significant workplace limitations
6 connected to that condition. Accordingly, Plaintiff has not shown that the record establishes that
7 she had a foot condition that was medically determinable and severe during the adjudicated
8 period, such that the ALJ should have discussed it at step two.

9 3. *IBS*

10 The ALJ acknowledged that Plaintiff had a history of IBS, but found that prior to the
11 DLI, the condition was mentioned only sporadically and no limitations were referenced in
12 connection with it. AR at 14. Plaintiff contends that the ALJ erred in finding IBS not severe
13 because her IBS symptoms flare as a result of medications she takes for back pain. (Dkt. # 15 at
14 3.)

15 Although Plaintiff contends, without citation to the record, that her IBS symptoms have
16 been flaring, she has not shown or even argued that her IBS caused significant workplace
17 limitations during the adjudicated period. Accordingly, she has not shown that the ALJ erred in
18 finding that Plaintiff's IBS did not significantly impair her ability to work, and was therefore, not
19 severe during the adjudicated period.

20 **B. The ALJ Did Not Err at Step Three**

21 The ALJ found that Plaintiff did not meet or medically equal Listing 1.04 because the
22 record contained no evidence of nerve root compression, spinal arachnoiditis, or lumbar spinal
23 stenosis, as required in Listing 1.04. AR at 14. The ALJ also noted that Plaintiff's back disorder

1 had not resulted in an inability to ambulate, as defined in the regulations. *Id.* Plaintiff argues that
 2 the ALJ erred in finding that she did not meet or equal Listing 1.04. (Dkt. # 15 at 2.)

3 At step three, the ALJ considers whether one or more of a claimant's impairments meet
 4 or medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. "The
 5 listings define impairments that would prevent an adult, regardless of his age, education, or work
 6 experience, from performing *any* gainful activity, not just 'substantial gainful activity.'" *Sullivan*
 7 *v. Zbley*, 493 U.S. 521, 532 (1990) (emphasis in original and citations omitted).

8 Plaintiff bears the burden of proof at step three. *Bowen*, 482 U.S. at 146 n.5. A mere
 9 diagnosis does not suffice to establish disability. *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th
 10 Cir. 1985). "[An impairment] must also have the *findings* shown in the Listing of that
 11 impairment." *Id.* at 1549-50 (quoting 20 C.F.R. § 404.1525(d); emphasis added in *Key*). To
 12 meet a listing, an impairment "must meet *all* of the specified medical criteria." *Sullivan*, 493 U.S.
 13 at 530 (emphasis in original). "To equal a listed impairment, a claimant must establish
 14 symptoms, signs and laboratory findings 'at least equal in severity and duration' to the
 15 characteristics of a relevant listed impairment[.]" *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.
 16 1999); § 416.926 (a); *see also Sullivan*, 493 U.S. at 531 (to establish equivalency, claimant "must
 17 present medical findings equal in severity to *all* the criteria" for the listing).

18 All of the spinal disorders that are covered in Listing 1.04 require that the condition
 19 results in an inability to ambulate effectively. 20 C.F.R. Part 404, Subpart P, Appendix 1,
 20 §§ 1.00B(2)(b), 1.04A-C (2020). Plaintiff has pointed to no evidence that her back condition left
 21 her unable to ambulate effectively, *i.e.*, "having insufficient lower extremity functioning [] to
 22 permit independent ambulation without the use of a hand-held assistive device(s) that limits the
 23 functioning of both upper extremities." 20 C.F.R. Part 404, Subpt. P, App. 1, §§ 1.00B(2)(b)(1)

1 (2020). Plaintiff herself reported an ability to walk 10-20 minutes at a time (AR at 210), and the
 2 ALJ cited evidence of Plaintiff's normal gait upon examination. *Id.* at 15-16 (citing *id.* at 273,
 3 332-33, 356, 395). Plaintiff has not shown that the record would support a finding that she could
 4 not ambulate effectively, as required by Listing 1.04, and thus has not established error in the
 5 ALJ's finding that she does not meet or equal that listing.

6 C. The ALJ Did Not Err in Discounting Plaintiff's Testimony

7 The ALJ summarized Plaintiff's allegations and explained that she discounted them
 8 because the records from the adjudicated period show that: (1) Plaintiff's back pain improved
 9 with exercises, medication, massage, and acupuncture; and (2) Plaintiff was able to work
 10 part-time during the adjudicated period, while also attending classes full-time. AR at 17. The
 11 ALJ also noted that records years after the adjudicated indicate that Plaintiff reported "she felt
 12 well and was able to care for her elderly parents." *Id.*

13 Plaintiff argues disputes some of the ALJ's findings related to her allegations. (Dkt. # 15
 14 at 4-6.) Specifically, Plaintiff contests the ALJ's summary of a chiropractic evaluation from
 15 August 2003. The ALJ stated that at this evaluation, Plaintiff reported that her pain did not
 16 radiate into her lower extremities. AR at 15 (citing *id.* at 271). Plaintiff contends that the text of
 17 the evaluation report actually suggests that her pain did radiate into her leg (dkt. # 15 at 4), but
 18 the report reads: "[Plaintiff's] pain is described as stiffness and ache without radiating pain,
 19 paresthesia, or weakness into the lower extremity." AR at 271. Plaintiff has not shown that the
 20 ALJ erred in summarizing the evaluation.²

21
 22
 23 ² The chiropractic evaluation also notes that Plaintiff was working full-time as a bookkeeper at the time
 (AR at 272), and Plaintiff explains the circumstances of her work at the time (dkt. # 15 at 4-5) but does
 not show that the ALJ mischaracterized the evidence in noting that she was working at the time of the
 evaluation. See AR at 15.

1 Next, Plaintiff disputes the ALJ's summary of a November 2005 evaluation report. (Dkt.
 2 # 15 at 5.) The ALJ stated that Plaintiff reported working 15-19 hours/week doing horticulture
 3 work, while attending classes full-time to obtain a horticulture degree. AR at 15. The ALJ noted
 4 that Plaintiff reported being ““able to do most of the aspects of her job”” but that she avoided
 5 heavy lifting/pushing/pulling. *Id.* Plaintiff claims that she reported being able to perform only
 6 “some” of the tasks of a horticulturist (dkt. # 15 at 5), but the ALJ accurately quoted Plaintiff’s
 7 report that she could perform “*most* of the aspects of her job.” See AR at 324 (emphasis added).
 8 It appears that Plaintiff may have been drawing a distinction between the tasks of a horticulturist
 9 and the tasks of her own work-study position. In any event, Plaintiff has not shown that the ALJ
 10 erred in characterizing and quoting the record in this regard.

11 Plaintiff also challenges another aspect of the ALJ’s summary of the November 2005
 12 evaluation report. The ALJ stated that Plaintiff told the evaluator “she was able to sit for long
 13 periods of time while in class and stated that she took Vicodin for flare-ups[.]” AR at 15.
 14 Plaintiff contends that she did not report that she could tolerate sitting for long periods very well
 15 (dkt. # 15 at 5), but the ALJ did not state that she reported that she tolerated sitting for long
 16 periods very well, and thus, Plaintiff has failed to show error in the ALJ’s summary of this aspect
 17 of the evaluation.³

18 Lastly, Plaintiff suggests that the ALJ overstated the record when finding that she
 19 reported being able to care for her parents years after the adjudicated period (AR at 17), because
 20 her parents actually live in a retirement home, and she was not a caregiver to them. (Dkt. # 15 at
 21

22 ³ Plaintiff also notes that the evaluator recommended that a psychiatrist review the category system of
 23 impairment rating to determine if Plaintiff’s condition had worsened since the last evaluation, but that
 before she was able to undergo this review, she was involved in a car accident. (Dkt. # 15 at 5-6.) Plaintiff
 does not tie these circumstances to an error in the ALJ’s decision, and thus the Court need not address this
 portion of the evaluation report further.

6.) Yet, as Plaintiff acknowledges (*id.*), Plaintiff speculated that her blood pressure was high during an April 2019 appointment because she reported being “very stressed out with finances and care of her parents with dementia.” AR at 502. Plaintiff made a similar report on another occasion. *See, e.g., id.* at 528 (“[Plaintiff] is taking care of her aging/ailing parents. This is stressful.”). Given that Plaintiff described herself as caring for her parents, the ALJ did not err in stating that Plaintiff reported caring for her parents. The ALJ did not find, for example, that Plaintiff was the primary caregiver for her parents, or that the care she provided them constituted substantial gainful activity. Plaintiff has not shown that the ALJ overstated the record in noting that Plaintiff reported caring for her parents.

Because Plaintiff has not shown that the ALJ erred in characterizing the record or in finding it somewhat inconsistent with her allegations, the Court declines to disturb the ALJ's assessment of Plaintiff's testimony.

V. CONCLUSION

For the foregoing reasons, the Commissioner's final decision is **AFFIRMED**, and this case is **DISMISSED** with prejudice.

Dated this 26th day of August, 2022.


MICHELLE L. PETERSON
United States Magistrate Judge